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### **JURISDICTIONAL STATEMENT**

The original Jurisdictional Statement is incorporated here.

### **STATEMENT OF FACTS**

The original Statement of Facts is incorporated here.

## **POINTS RELIED ON**

### **I.**

**THE MOTION COURT CLEARLY ERRED IN DENYING THE REQUEST FOR A MENTAL EVALUATION TO DETERMINE MR. SMITH'S COMPETENCY TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED HIM ALL THE RIGHTS ENUMERATED IN THE ORIGINAL BRIEF IN THAT THERE WAS NEW EVIDENCE THAT CALLS INTO QUESTION MR. SMITH'S COMPETENCY TO WAIVE THOSE RIGHTS INCLUDING: A FIRST EVER DIAGNOSIS OF BIPOLAR DISORDER WITH PSYCHOTIC FEATURES, POTOSI'S CHIEF OF MENTAL HEALTH SERVICES, DR. SELBERT, RECOMMENDING AN EVALUATION, AND TWO REQUESTS BY MR. SMITH IMMEDIATELY BEFORE THE MOTION COURT HEARD EVIDENCE THAT HIS ANTI-PSYCHOTIC MEDICATION BE INCREASED.**

Gerald Smith v. Armontrout, 865 F.2d 1502 (8<sup>th</sup> Cir. 1988);

Hampton v. State, 10 S.W.3d 515 (Mo. banc 2000);

Holt v. Bowersox, 191 F.3d 970 (8<sup>th</sup> Cir. 1999);

State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987);

U.S. Const., Amends VIII and XIV;

Mo. Const., Art. I, Sec. 10 and Sec. 21; and

Rule 29.15.

## **II.**

**THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER DR. SELBERT'S RECOMMENDATION THAT THE MOTION COURT ORDER AN EVALUATION OF MR. SMITH TO DETERMINE HIS COMPETENCY TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED HIM ALL THE RIGHTS ENUMERATED IN THE ORIGINAL BRIEF IN THAT AS THE STATE'S DESIGNATED CHIEF OF MENTAL HEALTH SERVICES AT POTOSI DR. SELBERT HAD PREVIOUSLY RECOMMENDED MR. SMITH BE TREATED BY THE POTOSI PSYCHIATRIST, AND THEREFORE, HE WAS EQUALLY QUALIFIED TO RECOMMEND A FORENSIC EVALUATION TO DETERMINE COMPETENCY TO WAIVE 29.15 RIGHTS AND DR. SELBERT'S TESTIMONY WAS NOT CUMULATIVE TO DR. STACY'S RECOMMENDATION BECAUSE DR. SELBERT'S TESTIMONY HAD HEIGHTENED PROBATIVE VALUE AS A TREATMENT CARE PROVIDER WITH REGULAR CONTACT WITH MR. SMITH WHEREAS DR. STACY WAS AN EXPERT RETAINED BY A PARTY LITIGANT.**

State v. Hayes, 785 S.W.2d 661 (Mo. App., W.D. 1990);

U.S. Const., Amends VIII and XIV;

Mo. Const., Art. I, Sec. 10 and Sec. 21; and

Rule 29.15.

## **ARGUMENT**

### **I.**

**THE MOTION COURT CLEARLY ERRED IN DENYING THE REQUEST FOR A MENTAL EVALUATION TO DETERMINE MR. SMITH'S COMPETENCY TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED HIM ALL THE RIGHTS ENUMERATED IN THE ORIGINAL BRIEF IN THAT THERE WAS NEW EVIDENCE THAT CALLS INTO QUESTION MR. SMITH'S COMPETENCY TO WAIVE THOSE RIGHTS INCLUDING: A FIRST EVER DIAGNOSIS OF BIPOLAR DISORDER WITH PSYCHOTIC FEATURES, POTOSI'S CHIEF OF MENTAL HEALTH SERVICES, DR. SELBERT, RECOMMENDING AN EVALUATION, AND TWO REQUESTS BY MR. SMITH IMMEDIATELY BEFORE THE MOTION COURT HEARD EVIDENCE THAT HIS ANTI-PSYCHOTIC MEDICATION BE INCREASED.**

In Hampton v. State, 10 S.W.3d 515, 516-17 (Mo. banc 2000), this Court ruled that a mental evaluation to determine competency to waive 29.15 rights is required when there is "new evidence" that calls into question a movant's competency to waive those rights. The new evidence in Mr. Smith's case includes a first ever diagnosis of bipolar disorder with psychotic features, Potosi's Chief of Mental Health Services Dr. Selbert's recommendation that an evaluation be

performed, and two requests by Mr. Smith to increase his anti-psychotic medication shortly before the motion court heard evidence.

The respondent has argued that there was no evidence that Mr. Smith was incompetent to waive his 29.15 rights, and therefore, the motion court properly dismissed (Resp. Br. 21, 31). Under Hampton, the standard for whether a mental evaluation must be ordered is whether there was “new evidence” that calls into question a movant’s competence. The decision in Hampton does not require evidence that establishes a movant is incompetent.

Mr. Smith’s Potosi mental health care providers diagnosed him for the first time ever on January 27, 2000 as having bipolar disorder with psychotic features (R.Tr. 157; Ex. 5 at 154). Dr. Stacy, who had evaluated Mr. Smith for defense counsel prior to trial, testified at trial that he had found no evidence of psychosis (T.Tr. 1127). In Dr. Stacy’s pretrial report to counsel, he found that a bipolar disorder diagnosis was precluded because Mr. Smith had not presented symptomology consistent with such a diagnosis (T. L.F. 257). The post-trial bipolar disorder diagnosis with psychotic features is the type of new evidence Hampton contemplated and required the motion court order Mr. Smith be evaluated.

During the course of Mr. Smith’s care at Potosi, he has struggled with his psychotic disorder. On August 5, 1999, Mr. Smith reported to his psychiatrist Dr. Reddy that he was seeing images projected on the wall and believed he was receiving messages through the television (R.Tr. 145-48; Ex. 5 at 191).



The motion court conducted its hearing on July 31, 2002. On April 25, 2002, Mr. Smith wrote to his psychiatrist, Dr. Jones, and requested his anti-psychotic, Risperdal, be increased (R.Tr. 170-71, 173; Ex. 14 at 35). Sometime after June 6, 2002, Mr. Smith wrote to Dr. Jones again and asked that his anti-psychotic medication be increased further (R.Tr. 171-72; Ex. 16 at 17). These requests to increase anti-psychotic medication made so close in time to the hearing are the type of new evidence that required the motion court order an evaluation. See Hampton.

The respondent misleads and misrepresents the record when it references testimony from Dr. Stacy, relating to Mr. Smith's letters to Dr. Jones, as supporting a finding that he was competent because he was aware that his anti-psychotic medication needed to be increased (Resp. Br. 27-28). Dr. Stacy indicated that the "symptoms" Mr. Smith was describing in these two letters were "factors" supporting his recommendation that an evaluation be ordered (R.Tr. 121-22). Dr. Stacy noted that Mr. Smith's letters to Dr. Jones merely reflected "some awareness and some insight" (R.Tr. 121-22), not that he was taking an "active role in his treatment" (Resp. Br. 20-21).

Respondent represents that one factor Dr. Stacy relied on, Mr. Smith's difficulties concentrating, was not properly a factor to consider because Dr. Jones had noted substantial improvement in his concentration on October 2, 2001 (Resp. Br. 28). According to respondent, "the cause for Stacy's concern had long since been alleviated" (Resp. Br. 28). What respondent failed to tell this Court is that on

October 5, 2001 Dr. Jones requested to be allowed to prescribe a non-formulary medication because Mr. Smith's medications were still causing him to have difficulty concentrating, and therefore, impairing his ability to participate in his case (R.Tr. 163-64; Ex. 10 at 2). Respondent's discounting of Mr. Smith's difficulty concentrating, and Dr. Stacy's reliance on it, are contrary to the actions Dr. Jones took on October 5, 2001.

The respondent also relies on Dr. Selbert's testimony that when Dr. Jones saw Mr. Smith in July, 2002, he characterized Mr. Smith's condition as "stable." (Resp. Br. at 28). What respondent failed to tell this Court is that Dr. Selbert stated that Dr. Jones found Mr. Smith's condition "stable" only for someone who has Mr. Smith's diagnosis and who is receiving medications and counseling for his diagnosed disorder of bipolar disorder with psychotic symptoms (R.Tr. 183-84). Respondent wants this Court to equate a stabilization of Mr. Smith's bipolar disorder with psychotic symptoms with competency to waive his appeals. Dr. Selbert expressly stated that his testimony should not be treated in that manner. Dr. Selbert testified he was not expressing an opinion on Mr. Smith's competency to waive his appeals because his function at Potosi was to provide care for Mr. Smith's mental health needs and not to render opinions on competency to waive appeals (R.Tr. 173-77). In fact, Dr. Selbert recommended that the motion court order an evaluation to determine Mr. Smith's competence to waive his 29.15 rights (R.Tr. 173-77).

In making its argument there was no evidence that Mr. Smith was incompetent, respondent points to testimony from Dr. Stacy that bipolar disorder does “not equate to incompetence” (Resp. Br. 22). What respondent failed to tell this Court is Dr. Stacy testified that bipolar disorder “is always a condition that can qualify” to render someone incompetent to proceed (R.Tr. 113). The fact that Mr. Smith was diagnosed with bipolar disorder with psychotic features for the first time by Potosi’s mental health treatment providers and that diagnosis might render Mr. Smith incompetent to proceed is the kind of “new evidence” that required a mental evaluation. See Hampton.

The respondent states that “[a] progress report on June 6, 2002, did not note any problems.” (Resp. Br. 21). Mr. Smith’s second letter asking Dr. Jones to increase his anti-psychotic medication was written sometime after June 6, 2002 (R.Tr. 171-72; Ex 16 at 17). That Mr. Smith’s second letter to Dr. Jones followed a report where no complaints were noted only highlights why an evaluation was required.

The respondent misrepresents the record when it states that Dr. Selbert was “not qualified to make diagnoses” (Resp. Br. 22). Until December 1, 2001, Dr. Selbert, as a licensed professional counselor, was required to make DSM IV diagnoses (R.Tr. 178-79, 182-83). That job requirement only changed as of December 1, 2001, when there was some privatization of services and Dr. Selbert was directed to provide only assessment information, but not diagnoses (R.Tr. 178-79). Dr. Selbert in fact provided DSM IV diagnoses in his October 21, 1999

evaluation (Ex. 5 at 173) and June 25, 2001 Individual Treatment Plan (Ex. 7 at 50).

The State points to Dr. Selbert's testimony that Mr. Smith was a "model offender" (Resp. Br. 22) as evidence that Mr. Smith is competent. Dr. Selbert qualified this description indicating that Mr. Smith has "ongoing mental health needs" and is in need of essential treatment (R.Tr. 183). Dr. Selbert's complementary description of Mr. Smith, comparing him to other inmates, simply does not speak to the issue of Mr. Smith's competence to waive his 29.15 rights.

The State claims that Mr. Smith is competent because Dr. Selbert testified that he was not then concerned about Mr. Smith's safety or the safety of others (Resp. Br. 22-23). In Dr. Selbert's October 21, 1999, report he found that Mr. Smith "may pose a significant threat to harm himself or others on rare but unpredictable occasions" (Ex. 5 at 173) (emphasis added). Based on Mr. Smith's history of suicidal tendencies and attempts, Dr. Selbert could not rule-out that Mr. Smith was suicidal at the time of the hearing (R.Tr. 184-85). Because Mr. Smith could be a significant threat to harm himself or others on rare, but unpredictable occasions and Dr. Selbert could not rule-out that Mr. Smith was then suicidal, the testimony respondent points to does not establish Mr. Smith was competent to waive his 29.15 rights.

The respondent relies on several Eighth Circuit cases that simply are inapplicable. The most pertinent Eighth Circuit decision, not discussed by respondent, is Holt v. Bowersox, 191 F.3d 970 (8<sup>th</sup> Cir. 1999). In Holt, the State

of Missouri contended that Holt was foreclosed from bringing his habeas corpus petition because he had failed to file a 24.035 motion. Holt, 191 F.3d at 972-74. A mental evaluation conducted during the state trial court proceedings indicated Holt displayed no signs of psychosis. Holt, 191 F.3d at 973. After Holt was sent to prison, his psychiatric records reflected psychotic behavior. Holt, 191 F.3d at 972-73. These records called into question Holt's mental competence at the time his 24.035 motion was due to be filed. Holt, 191 F.3d at 975. Confronted with those psychiatric records, the Eighth Circuit ordered the case remanded to the district court for a hearing to determine whether Holt was mentally incompetent during the period when his 24.035 motion could have been filed. Holt, 191 F.3d at 975. Mr. Smith is like Holt because no evidence of psychotic behavior was identified prior to trial. After Mr. Smith arrived at Potosi, he had documented psychotic behavior for which he is still receiving treatment. Like Holt, Mr. Smith's documented psychotic disorder calls into question whether he is competent. That is why a mental evaluation is required now.

Respondent relies on Gerald Smith v. Armontrout, 865 F.2d 1502 (8<sup>th</sup> Cir. 1988) to argue that Mr. Smith is competent and an evaluation was not required (Resp. Br. 26-27, 32, 34). In the cited Gerald Smith opinion, the death sentenced petitioner was seeking to waive his remaining appeal rights and be executed. Gerald Smith, 865 F.2d at 1503-05. The next friend filings made on Gerald Smith's behalf requested a "new evidentiary hearing" on his competence. Gerald Smith, 865 F.2d at 1504-05. The request for a hearing was rejected because there

was insufficient new evidence calling into question Gerald Smith's competence. Gerald Smith, 865 F.2d at 1504-06. Specifically the request was denied because "absent are any allegations of new psychiatric examinations or new conduct by Smith, other than the facts of his marriage and his changes of mind." Gerald Smith, 865 F.2d at 1504. The affidavits from three psychiatrists did not support a new competency determination because they were premised on the just noted facts. Gerald Smith, 865 F.2d at 1505.

When this Court ordered an execution date for Gerald Smith, without an evaluation to determine his competence to waive his rights, the federal district court stayed his execution and ordered a mental evaluation to determine his competency to forgo his state post-conviction rights. See Gerald Smith v. Armontrout, 632 F. Supp. 503, 504-07 (W.D. Mo. 1986). The federal district court held an extensive and searching hearing on Gerald Smith's competence to waive his rights and found he was competent to do so. Gerald Smith, 865 F.2d at 1503. Because there was no new evidence that called into question Gerald Smith's competence, the Eighth Circuit denied the request for a "new evidentiary hearing." Gerald Smith, 865 F.2d at 1504-06.

In Gerald Smith's case, the district court had ordered his execution stayed and a mental evaluation conducted because "a legitimate issue" had been raised as to his competency. Gerald Smith v. Armontrout, 632 F. Supp. at 504-07. Those same considerations exist here. Since going to Potosi John Smith has had documented psychotic behavior, been diagnosed as having bipolar disorder with

psychotic features, and made two requests to increase his anti-psychotic medication close in time to when the motion court heard evidence. Additionally, the Chief of Mental Health services at Potosi, Dr. Selbert, has recommended that an evaluation of Mr. Smith be conducted. Dr. Stacy also recommended that the motion court order an evaluation of Mr. Smith. Unlike Gerald Smith's case, here there were new psychiatric examinations and new psychotic conduct presented that raised substantial questions as to John Smith's competency to waive his 29.15 rights.

The decision in Garrett v. Goose, 99 F.3d 283 (8<sup>th</sup> Cir. 1996) is inapplicable (Resp. Br. 32). There, Garrett was appealing the dismissal of his second, successive habeas corpus petition. Garrett, 99 F.3d at 284. To try to excuse his failure for litigating claims in his first habeas petition, Garrett relied on mental incapacity. Garrett, 99 F.3d at 285. The successive petition was properly dismissed because "[n]o facts are alleged to indicate that [Garrett's] condition worsened between the time of his trial in the state court and the filing of his first habeas petition." Garrett, 99 F.3d at 286. The record here shows that John Smith's condition has worsened from the time he was convicted and sent to Potosi. That worsening included the new diagnosis of bipolar disorder with psychotic features and documented psychotic behavior.<sup>1</sup>

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<sup>1</sup> The language respondent quotes (Resp. Br. 32) from Garrett fails to apprise this Court that in the middle of the quoted material a citation to the Eighth Circuit's

The decision in Anderson v. White, 32 F.3d 320 (8<sup>th</sup> Cir. 1999) is not instructive here (Resp. Br. 26-27, 29-30). In Anderson, the habeas petitioner filed an untimely 24.035 motion and sought to excuse that defect because he suffered from a mental disease. Anderson, 32 F.3d at 321-22. The procedural default was not excused because: (1) there was no evidence that during the time for filing a 24.035 motion Anderson was incompetent and; (2) in his untimely 24.035 motion he had alleged it was untimely because the prison library was inadequate. Anderson, 32 F.3d at 322. Unlike Anderson, the motion court heard evidence that calls into question Mr. Smith's competence to waive his 29.15 rights and a competency evaluation was required.

The motion court heard irrational testimony from Mr. Smith when he told the motion court the reason "[w]hy" he wanted to dismiss was "Well, it all starts back in my trial attorneys. The way they tried to manipulate me. They weren't straight up with me." (R.Tr. 191). According to respondent, this testimony was not irrational because "it appears that his attorneys have never heeded his desire to dispense with lengthy legal proceedings." (Resp. Br. 40-41). Respondent's proposed findings included: "It appears to this Court that the only time the

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opinion in the Gerald Smith decision that sought a "new evidentiary hearing" appeared. For the reasons already discussed, supra, that Eighth Circuit decision in Gerald Smith does not apply, and therefore, the quoted language from Garrett is not instructive.



Movant has agreed to proceed to trial or appeal is when his wishes have been overcome by the persistence of his counsel” (2<sup>nd</sup> Supp. R.L.F. 6). Even though the motion court was urged to adopt the identical position now advanced by respondent here, it did not (R.L.F. 755-58) and this Court should do the same.

The decision in Reynolds v. Norris, 86 F.3d 796 (8<sup>th</sup> Cir. 1996) (Resp. Br. 34) actually supports a finding that a mental examination was required. The state trial court conducted two pretrial hearings on Reynolds’ competency and found him competent. Reynolds, 86 F.3d at 801. The Eighth Circuit held that the trial court judge should have halted the trial and conducted a new determination of competence based on new facts that occurred during trial. Reynolds, 86 F.3d at 801-02. Those new facts were Reynolds’ irrational testimony and a psychiatrist’s testimony that there had been a change in Reynold’s competency. Reynolds, 86 F.3d at 801-02. Like in Reynolds, the motion court heard irrational testimony from Mr. Smith and evidence of new psychiatric problems Mr. Smith has displayed during the course of his treatment at Potosi. The motion court should have ordered an evaluation of Mr. Smith.

According to respondent, Mr. Smith’s “recent psychiatric history at Potosi is very similar to, if not undistinguishable from, his pre-trial psychiatric history” (Resp. Br. 34-35). The respondent then recounts findings from Dr. Stacy’s pre-

trial report<sup>2</sup> and Dr. Peter's and Kline's pre-trial reports (Resp. Br. 34-38). Those findings, however, reflected a diagnosis of major depression, recurrent from Dr. Stacy (T.L.F. 265) and narcissistic personality disorder with obsessive compulsive traits and alcohol dependence from the State's trial experts, Drs. Peters and Kline (T.L.F. 308). Respondent then glibly refers to the State's own Potosi mental health care providers' new diagnosis of bipolar disorder as "undoubtedly just a new label applied to appellant's ongoing psychiatric condition" (Resp. Br. 38). The DSM-IV-TR identifies distinct "diagnostic criteria" for bipolar disorder (DSM-IV-TR at 382-97) and major depressive disorder (DSM-IV-TR at 369-76). Not only does the DSM-IV-TR treat these mental impairments as reflecting more than "a new label", but also Dr. Stacy's pretrial findings support this view. In particular, Dr. Stacy concluded pre-trial that a bipolar disorder diagnosis was precluded because Mr. Smith had not demonstrated symptomology consistent with

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<sup>2</sup> Respondent references Dr. Stacy's report stating: "The '6' scores suggested 'frankly psychotic behavior' (L.F. 250)" (Resp. Br. 36). That report, in context, stated as follows: "Elevations of Scale 6 at the magnitude achieved by the defendant often suggest frankly psychotic behavior. However, because of the diversity of items comprising this scale, a score of this magnitude can be achieved without endorsing any of the most typically psychotic symptoms. Examination of the defendant's responses suggest that the latter is the case." (T.L.F. 250). Dr. Stacy found no evidence of psychosis pre-trial. (T.Tr. 1127).

such a diagnosis (T.L.F. 257). The change in diagnosis, assigned by the State's own mental health providers, reinforces why an evaluation was required. It is irrelevant that Mr. Smith's bipolar disorder may have existed prior to coming to prison based on his heredity (Resp. Br. 38 n. 9). The fact is, he was never diagnosed with this mental illness until he was provided treatment at Potosi. It is impossible to know whether Mr. Smith's request to dismiss his 29.15 case is the product of his mental illness, no matter the diagnosis, or the decision of someone competent to make that decision. For that reason, an evaluation to determine competence to waive appeals was required.

The respondent reproduces details of Mr. Smith's psychiatric history as they appeared in Dr. Stacy's pre-trial report (Resp. Br. 34-38). Respondent contends that Dr. Stacy's opinion an evaluation should be performed now was based on the same kinds of behaviors at Potosi that Dr. Stacy had described previously in his pretrial report (Resp. Br. 34-38). Dr. Stacy testified, however, that his opinion was based on all the symptoms Mr. Smith had displayed since going to Potosi, including those related to his psychotic behavior (R.Tr. 109).

The respondent wants this Court to believe that the record shows that Mr. Smith's condition has "improved" (Resp. Br. 16, 19). Dr. Stacy testified, based on Mr. Smith's treatment records, that while at Potosi, Mr. Smith's mental status has presented "a fluctuating clinical course." (R.Tr. 109). Mr. Smith's condition has not improved over time, rather his two requests to Dr. Jones to increase his anti-psychotic medication shortly before the motion court heard evidence, highlights

that Mr. Smith's clinical course has not been one of steady improvement, but instead one with a fluctuating course.

According to respondent, Dr. Selbert's testimony that Mr. Smith had reported to Dr. Jones on October 2, 2001 that he was concerned that his inability to concentrate would adversely impact his ability to participate in his defense (R.Tr. 162) did not mean that Mr. Smith had told Dr. Jones that he wanted to continue with his appeals (Resp. Br. 38-39 n.10). The State represents, without any record citation, that Dr. Selbert's testimony "meant that appellant wanted to be able to participate in his representation" (Resp. Br. 38-39 n.10). Besides no record support for these assertions, Mr. Smith could not "participate in his representation" if he dismissed his 29.15 case. This Court should recognize such argument for what it is - semantic gamesmanship.

The respondent claims that the motion court acted consistent with this Court's decision in State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987) (Resp. Br. 29). In Wilkins, the trial court had previously conducted a competency hearing at which psychiatric testimony was presented and found Wilkins was competent to proceed and to discharge counsel. Wilkins, 736 S.W.2d at 412-13. Despite this prior trial court determination, after this Court heard statements directly from Wilkins taking issue with some of the Public Defender's argument, this Court ordered Wilkins be evaluated by the Department of Mental Health to determine Wilkins' competence to waive counsel on appeal. Wilkins, 736 S.W.2d at 411. That evaluation found that Wilkins was not competent to waive his right to

counsel on appeal. See Wilkins v. Bowersox, 933 F.Supp. 1496, 1502-03 (W.D. Mo. 1996). When the motion court heard that Mr. Smith wanted his 29.15 case dismissed because his trial attorneys “weren’t straight up with me” (R.Tr. 191), it should have taken the same action this Court did in Wilkins - order an evaluation.

The State relies on Woods v. State, 994 S.W.2d 32 (Mo. App., W.D. 1999) for the proposition that the motion court properly relied on Mr. Smith’s testimony to deny an evaluation (Resp. Br. 29). In Woods, the Court of Appeals noted that there “was nothing before the court, either in Woods’ testimony or actions” that warranted ordering an evaluation. Woods, 994 S.W.2d at 38. Here, the motion court heard testimony from Mr. Smith that the reason he wanted to dismiss his 29.15 case was because his trial attorneys “weren’t straight up with me.” That testimony was like the statements this Court heard from Wilkins when he took issue with some of the Public Defender’s argument. In response, this Court ordered that Wilkins be evaluated and the 29.15 court should have done the same here.

The motion court had before it new evidence that at Potosi Mr. Smith was diagnosed for the first time with bipolar disorder with psychotic features, two requests from Mr. Smith to Dr. Jones to increase his anti-psychotic medication immediately prior to the hearing, and Potosi’s Chief of Mental Health Services Dr. Selbert’s recommendation that Mr. Smith be evaluated. These matters, and all the other evidence presented to the motion court, established that there were substantial questions as to Mr. Smith’s competence and that an evaluation to

determine his competency to waive his 29.15 rights was required. This Court should reverse and remand with directions that the motion court order a mental evaluation of Mr. Smith.

## **II.**

**THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER DR. SELBERT'S RECOMMENDATION THAT THE MOTION COURT ORDER AN EVALUATION OF MR. SMITH TO DETERMINE HIS COMPETENCY TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED HIM ALL THE RIGHTS ENUMERATED IN THE ORIGINAL BRIEF IN THAT AS THE STATE'S DESIGNATED CHIEF OF MENTAL HEALTH SERVICES AT POTOSI DR. SELBERT HAD PREVIOUSLY RECOMMENDED MR. SMITH BE TREATED BY THE POTOSI PSYCHIATRIST, AND THEREFORE, HE WAS EQUALLY QUALIFIED TO RECOMMEND A FORENSIC EVALUATION TO DETERMINE COMPETENCY TO WAIVE 29.15 RIGHTS AND DR. SELBERT'S TESTIMONY WAS NOT CUMULATIVE TO DR. STACY'S RECOMMENDATION BECAUSE DR. SELBERT'S TESTIMONY HAD HEIGHTENED PROBATIVE VALUE AS A TREATMENT CARE PROVIDER WITH REGULAR CONTACT WITH MR. SMITH WHEREAS DR. STACY WAS AN EXPERT RETAINED BY A PARTY LITIGANT.**

Dr. Selbert was qualified to recommend a forensic evaluation be performed to determine Mr. Smith's competency to waive his 29.15 rights. The State of Missouri designated Dr. Selbert as the Chief of Mental Health Services at the Potosi Correctional Center (R.Tr. 130). Dr. Selbert's qualifications and responsibilities included referring Mr. Smith to the Potosi psychiatrist (R.Tr. 138)<sup>3</sup> Since the State of Missouri considered Dr. Selbert qualified to refer Mr. Smith to the Potosi psychiatrist, he was equally qualified to recommend Mr. Smith be evaluated by a forensic examiner to determine his competency to waive his 29.15 rights.

Respondent asserts that because Dr. Selbert testified it was not his function at Potosi to perform forensic evaluations to determine competency to waive rights and he was not trained to perform forensic competency evaluations that he was not qualified to recommend that someone who is qualified conduct a forensic evaluation of Mr. Smith (Resp. Br. 45). Dr. Selbert is a licensed professional counselor who as the Chief of Mental Health Services was part of a team of treatment care providers that utilized the Diagnostic and Statistical Manual of Mental Disorders (D.S.M.) to treat Mr. Smith (R.Tr. 130, 137-39, 150), he did an initial evaluation of Mr. Smith in July, 1999 (R.Tr. 139-41; Ex. 5 at 196), he provided care for Mr. Smith after his August, 1999 suicide attempt (R.Tr. 142-45;

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<sup>3</sup> Dr. Selbert's qualifications will not be repeated in their entirety here. For a detailed discussion of those qualifications, see the original brief at pages 42-44.



Ex. 5 at 174, 193, 236), he authored in October, 1999 an eleven page psychological report that included DSM IV diagnoses (R.Tr. 154-54; Ex. 5 at 163-73), and he completed in June, 2001 an Individual Treatment Plan for Mr. Smith containing DSM IV diagnoses (Ex.7 at 50). Dr. Selbert's training and care made him uniquely qualified to recommend that Mr. Smith be evaluated by someone whose expertise includes performing forensic competency evaluations.

The respondent asserts that Dr. Selbert's "experience did not qualify him to offer opinions as to appellant's competence to waive his post-conviction motion" (Resp. Br. 46). Dr. Selbert was never asked to express an opinion on Mr. Smith's competence to forgo his 29.15 rights (See R.Tr. 173-77 reproduced at App. Br. 45-48). What the motion court refused to consider was Dr. Selbert's testimony that based on the care he has provided to Mr. Smith that he would recommend that the motion court order Mr. Smith be evaluated by a forensic examiner qualified to determine Mr. Smith's competence to waive his 29.15 rights (See R.Tr. 173-77 reproduced at App. Br. 45-48).

According to the respondent, Dr. Selbert's recommendation was offered to establish Mr. Smith "was actually incompetent" (Resp. Br. 46). Dr. Selbert was called to testify and recount the nature of the mental health care that he has provided to Mr. Smith to establish there is reason to question Mr. Smith's competency and that Mr. Smith should now be evaluated by a forensic examiner qualified to render an opinion on Mr. Smith's competency to waive his 29.15

rights. See Orig. App. Br. Point I. Dr. Selbert was never asked to express the opinion that Mr. Smith is incompetent to waive his 29.15 rights.

Respondent also claims that Mr. Smith's rights were not prejudiced because the motion court heard Dr. Stacy recommend that an evaluation to determine Mr. Smith's competency to waive his rights be performed (Resp. Br. 47). In State v. Hayes, 785 S.W.2d 661, 662-64 (Mo. App., W.D. 1990), the Court of Appeals concluded counsel was ineffective for failing to call a witness who would have corroborated the defendant's testimony. In reaching that result, the Hayes Court noted that "[c]orroboation is critical, and corroborative testimony by a single witness can never be discounted as 'merely cumulative'" Hayes, 785 S.W.2d at 663. Dr. Selbert was one of Mr. Smith's treatment care providers at Potosi. Dr. Selbert's only purpose at Potosi in caring for Mr. Smith is to "provid[e] comfort in times of distress." (R.Tr. 175). Because Dr. Selbert's only role at Potosi is to provide care for Mr. Smith, his recommendation had heightened probative value compared to Dr. Stacy's recommendation. In that role, Dr. Selbert had regular contact with Mr. Smith in caring for his mental health needs. In contrast, Dr. Stacy was an expert retained by a party litigant whose recommendation was based on his prior encounters as an expert evaluator and in reviewing Mr. Smith's Potosi treatment records. Dr. Stacy did not have the benefit of being a participant in Mr. Smith's mental health care, whereas, Dr. Selbert was able to make his recommendation working from the framework of someone who is responsible for Mr. Smith's daily mental health needs.

The motion court erred in refusing to consider Dr. Selbert's recommendation. This Court should consider Dr. Selbert's recommendation, in conjunction with all the other evidence calling into question Mr. Smith's competency, and order a mental evaluation to determine Mr. Smith's competency to waive his 29.15 rights. Alternatively, this Court should reverse and remand with directions that the motion court reconsider its ruling denying an evaluation in light of Dr. Selbert's recommendation.

## **CONCLUSION**

For the reasons discussed in Point I of the original and reply briefs, the motion court heard substantial new evidence that calls into question whether Mr. Smith is competent to forgo his 29.15 rights. Because there was substantial new evidence to question whether Mr. Smith was competent, this Court should reverse and remand with directions that the motion court order a mental evaluation of Mr. Smith to determine whether he is competent to waive his 29.15 rights.

As discussed in Point II of the original and reply briefs, Dr. Selbert, as one of Mr. Smith's treatment care providers at Potosi, was qualified to recommend that the motion court should order a forensic evaluation to determine whether Mr. Smith is competent to abandon his 29.15 rights. This Court should consider Dr. Selbert's recommendation that the motion court order an evaluation of Mr. Smith, along with all the other evidence that was presented to that court, and direct the motion court to order a mental evaluation of Mr. Smith. Alternatively, this Court should reverse and remand with directions that the motion court consider Dr. Selbert's recommendation that an evaluation is needed and reconsider its ruling denying an evaluation in light of Dr. Selbert's recommendation.

Respectfully submitted,

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**Certificate of Compliance**

I, William J. Swift, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains \_\_\_\_\_ words, which does not exceed the 7,750 (25% of 31,000) words allowed for an appellant's brief.

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William J. Swift

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I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the \_\_\_\_ day of \_\_\_\_\_ 2003, to the Office of the Attorney General, 1530 Rax Court, 2<sup>nd</sup> Floor, Jefferson City, Missouri 65101.

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William J. Swift

